85-1816

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE UNITED STATES SUPREME COURT

Term

FRICK CONSTRUCTION COMPANY, By its Trustee, LAWRENCE N. RAVICK,

Respondent,

vs.

ALPINE CONSTRUCTION COMPANY, EUGENE M. LITMAN and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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I. Questions Presented for Review

A. Should prejudgment interest have been awarded in the circumstances outlined in the ensuing question, when the issue was decided under Pennsylvania law by the Court of Appeals, the most recent Pennsylvania appellate decision in point determined that it was not warranted under such circumstances, and the Court of Appeals disposed of the issue in one sentence, without discussion?

B. Should prejudgment interest be awarded in a breach of contract claim where the contract between the parties precluded on award of interest, there was never a fixed sum payable to the claimant prior to trial, and the delay in payment of the claim was required by the claimant's excessive demand?

C. Where a building contractor is bound by a payment bond to pay claims asserted against its bankrupt subcontractor, should the building contractor be permitted to setoff the full face amount of those claims against claims asserted

against it on behalf of the bankrupt subcontractor, notwithstanding the building contractor's ability to negotiate reduced settlements of those claims?

D. In the circumstances outlined in the previous question, is there any legal basis for placing the trustee of a bankrupt subcontractor which was unable to fulfill its contractual obligations in a better financial position than the bankrupt would have been in if it had completed its contractual obligations and paid its creditors?

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III. Grounds for Invoking this Court's Jurisdiction

A. The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was filed and entered on March 13, 1986.

B. The Petitioners' Petition for Rehearing was denied by Court of Appeals Order dated and filed April 1, 1986.

C. By Order dated and filed April 16, 1986, the Court of Appeals stayed its issuance of the certified judgment in lieu of formal mandate until May 8, 1986 pursuant to F.R.A.P. 41(b).

D. Jurisdiction is conferred on this Court to review the judgment in question by writ of certiorari by 28 U.S.C. Sec. 1254(1).

IV. Statement of the Case

Frick Construction Company (Frick), a bankrupt subcontractor under a contract for construction of an apartment building, through its trustee, brought suit in the United States Bankruptcy Court for the Western District of Pennsylvania against the general contractor,

Alpine Construction Company (Alpine), Alpine's principal and Alpine's surety under its payment bond covering the building project. Frick claimed $364,350.62 for the unpaid balance under its subcontract and alleged extra work. Alpine denied liability and filed a Counterclaim which included a setoff for the amount of the claims for labor and materials against Frick, $232,437.45, which were asserted against Alpine under its payment bond. Alpine had negotiated settlements with those claimants totalling $176,447.18. The contract between the parties required Frick to pay for all labor and materials used in the performance of the subcontract, and provided that Frick was entitled to full payment only after it had paid all debts connected with its work. It also expressly stated that no interest was to be charged on any unpaid payments owed under the contract.

The Bankruptcy Judge awarded Frick judgment for $83,498.75 plus prejudgment interest thereon from the date of filing of the suit. The judgment included a setoff in Alpine's favor of $176,447.18, the amount of the settlements paid to Frick's creditor's by Alpine under its payment bond.

The judgment of the Bankruptcy Court was appealed to the United States District Court for the Western District of Pennsylvania, pursuant to the provisions of 28 U.S.C. Sec. 158(a). The District Court decided that Alpine was entitled to a setoff for the full value of the claims of Frick's creditors disposed of by Alpine under its payment bond, $232,437.45, accordingly reduced the judgment against Alpine by $55,990.27 (the difference between the claims asserted and the amounts paid to settle the claims), reduced the judgment in Frick's favor to $27,508.48, and awarded prejudgment interest thereon from the date of Alpine's alleged breach of the subcontract.

The District Court decision was appealed to the United States Court of Appeals for the Third Circuit, which reversed the District Court's judgment as to the allowable setoff to Alpine for payments under the payment bond, reinstated the Bankruptcy Court's allowance of only the amounts actually paid therefor, $176,447.18, and accordingly reinstated the judgment amount awarded by the Bankruptcy Court, $83,498.75. The Court of Appeals affirmed the award of prejudgment interest thereon from the date of Alpine's alleged breach of the subcontract.

V. Argument for Allowance of the Writ

A. An award of prejudgment interest was inappropriate under the circumstances.

According to the most recent reported decision by the Pennsylvania appellate courts on the issue of prejudgment interest, or compensation for delayed payment, such interest should not be awarded where there was never a fixed or ascertainable sum payable to the claimant prior

to trial, or where the delay in payment resulted from exorbitant claims, or where the contract between the parties precluded an interest charge. Frank B. Bozzo, Inc. v. Electric Weld Division, 498 A.2d 895 (Pa. Super. 1985). All three of those factors were established by the evidence in the present case. Counsel for the parties agreed that Pennsylvania law was controlling. If the Court of Appeals concluded that the issue was governed by authoritative pronouncements of the Pennsylvania Supreme Court, it should have so indicated. In fact, the precise interest issue presented in this case appears not to have been determined by the state's highest court. Absent such a determination, the federal courts must consider and give due regard to the decisions of state intermediate appellate courts, such as the decision of the Pennsylvania Superior Court in the Bozzo case. McGowan v. University of Scranton, 759 F.2d 287 (3rd Cir. 1985); Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548 (3rd Cir. 1985).

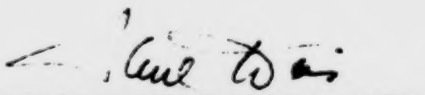
Yet the Court of Appeals chose to ignore the Bozzo decision, disposed of the issue without discussion of any kind, and stated only that ". . . Frick was properly awarded prejudgment interest." (Opinion P. 9a). Such cavalier treatment of the issue warrants review on writ of certiorari.

B. Alpine should have been granted a setofff in the amount of the claims asserted by Frick's creditors pursuant to the payment bond, rather than being restricted to the amount for which those claims were settled. If Frick had properly completed its building agreement, it would have in due course fully paid its labor and materials suppliers. Instead, Alpine paid claims against Frick amounting to $232,437.45, under its payment bond obligations, saving $55,990.27 in the process through negotiated claims settlements. The Court of Appeals gave that savings to Frick, by restricting Alpine's setoff to the amount

it actually paid to settle the claims. The Court of Appeals thus reduced Frick's labor and material costs by $55,990.27 and increased Alpine's construction costs by that amount, notwithstanding that Alpine's negotiating skills and efforts produced the savings, at a time when Alpine had legal exposure under its payment bond for the full amount claimed. Frick was thus placed in a better financial position by abandoning its contract than it would have been in if it had completed its contractual payment obligations. Alpine's settlement negotiations were pointless. It would have been better off resisting all claims, inviting all claimants to litigate their claims, thereby further overburdening court trial calendars. Alpine then could have claimed a present setoff for the full amount involved in the various suits, and subsequently negotiated settlements with the creditors and pocketed the savings.

The result produced by the Court of Appeals is inequitable, contrary to due process, and warrants review on writ of certiorari. See the relevant analysis in Watsabaugh & Co. v. Seaboard Surety Co., 26 F.Supp. 681 (D.C. Mont. 1938), aff'd 106 F.2d 355 (9th Cir. 1939).

Respectfully submitted,



Saul Davis
Attorney for Petitioners

VI. Listing of Corporate Affiliates

Fidelity and Deposit Company of Maryland is owned by a non-public parent which, in turn, is owned by two publicly owned Swiss corporations: Swiss Reinsurance Company and Zurich Insurance Company.

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3317 & 85-3354

FRICK CONSTRUCTION COMPANY, Debtor
LAWRENCE N. RAVICK, Trustee

vs.

ALPINE CONSTRUCTION COMPANY, EUGENE M. LITMAN and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellants in No. 85-3354,

FRICK CONSTRUCTION COMPANY by its Trustee, LAWRENCE N. RAVICK, Appellant in No. 85-3317

Argued February 14, 1986

Before: ADAMS, HUNTER, Circuit Judges, and GILES*, District Judge

Opinion filed March 13, 1986

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Saul Davis (Argued)
718 Fifth Avenue, Pittsburgh, PA 15219
Attorney for Alpine Construction Company, Eugene M. Litman and Fidelity and Deposit Company of Maryland

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*Honorable James T. Giles, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

HUNTER, Circuit Judge:

1. On December 23, 1980, Frick Construction Company ("Frick") and Alpine Construction Company ("Alpine") entered a contract under which Frick was to perform work on a construction project, the Swissvale High Rise Condominium, and receive $1,470,563.00 as compensation. Frick was to receive progress payments by making written applications. Alpine executed a payment bond and the Fidelity and Deposit Company of Maryland ("Fidelity") guaranteed payment to all suppliers of labor or material for the project.

2. Frick worked on the project from January, 1981 to March 23, 1982. From April 15, 1981 to February 18, 1982 Frick submitted eleven applications for progress payments and received $1,254,990.00 from Alpine. Frick submitted 26 invoices for additional work totalling $119,546.17, but did not receive payment for this work.

The additional work had either been specifically requested by Alpine or was made necessary by changes in the plans. Alpine never objected to the extra work or the invoices submitted.

3. On March 10, 1982 the U.S. Department of Housing and Urban Development (HUD), certified that construction on the project was more than 98% complete. The bankruptcy court later found that the project had been 94% to 98% completed. At that time Frick was owed $244,804.45 under the contract as well as payment for the extra work. Frick, therefore, suffered severe cash flow problems. The company was unable to pay some of its subcontractors and suppliers. On March 23, 1982, Frick terminated work on the project. On that same day, Frick filed for bankruptcy under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701-766. Many of Frick's suppliers and subcontractors had not been paid and

brought claims totalling $232,437.45 against the payment bond. Alpine negotiated settlements with these suppliers and subcontractors and satisfied the claims for a total of $176,447.18.

4. On January 27, 1983, Frick, through its trustee, brought suit against Alpine, Eugene M. Litman, and Fidelity, to recover the unpaid balance under the contract as well as payment for the extra work. The bankruptcy court judge found that Frick was owed $230,660.29 under the contract and $119,546.17 for the extra work. But the court found that Alpine had setoffs of $90,259.91 for the cost of completing the project and $176,447.18 for the payments made to Frick's subcontractors and suppliers. Therefore, the court entered judgment for Frick for $83,498.75. Alpine filed an appeal to the United States District Court for the Western District of Pennsylvania. Judge Cohill

found that Alpine was entitled to a setoff of $232,437.45, the amount of claims filed against the payment bond, rather than $176,447.18, the amount Alpine actually paid to the claimants.

5. Frick has brought this appeal to object to the district court's finding that Alpine is entitled to a setoff of the full amount paid to Frick's suppliers and subcontractors rather than the amount actually paid to these claimants by Alpine. Alpine contends that the setoff ordered was proper and in a counterclaim seeks an additional setoff of $47,446.56 for potential claims by other suppliers and subcontractors of Frick. Alpine also claims that Frick should only have been credited for $45,555.64 rather than $119,546.17 for the extra work. Lastly, Alpine claims that Frick was not entitled to prejudgment interest.

6. The bankruptcy court properly held that Alpine could only setoff the amount it actually paid to Frick's suppliers and subcontractors, $176,447.18, rather than $232,437.45 originally claimed by the suppliers and subcontractors. The district court erred in reversing the decision of the bankruptcy court and permitting a setoff for the full $232,437.45. Alpine argues that since it was able to negotiate settlements it should not be required to pass the benefits onto Frick. See Watsabaugh & Co. v. Seaboard Surety Co., 26 F.Supp. 681, 687 (D.C. Mont. 1938) aff'd, 106 F.2d 355 (9th Cir. 1939). Alpine argues that since it relieved Frick of an obligation to pay $232,437.45, it has a claim against Frick for that amount. However, subrogees are generally limited to collecting back actual payment. See Associated Hospital Service of Philadelphia v. Pustilnik, 497 Pa. 221, 226,439 A.2d 1149, 1151 (1981).

But the bankruptcy court had a more fundamental problem with all of Alpine's arguments. Alpine alleges that Frick owed its suppliers and subcontractors $232,437.45. But there is no hard evidence that the full amounts claimed were actually owed. Even if Alpine had not paid the claimants, Frick might very well have negotiated settlements on the claims.

7. The question becomes who should receive what the district court referred to as a "windfall." The district court allowed Alpine, the general contractor, to take a setoff for the full amount claimed by the suppliers and subcontractors of Frick. This put Frick, the subcontractor, in the same position it would have been in if it had paid the claims itself (assuming it did not settle). This put Alpine, the general contractor, in a better position than it would have been in if Frick had fulfilled its

obligations. There is no reason to place the general contractor in this case, Alpine, in a better position than it would have been in if the subcontractor, Frick, had performed. Alpine should receive a setoff for the actual amounts it paid. Both parties seemed to have been at fault. Both the bankruptcy court and the district court recognized that it was largely the overdue progress payments from Alpine which caused Frick's financial problems and eventually its termination of work on the project.

8. The district court properly dealt with the remainder of Alpine's claims. Alpine seeks an additional setoff credit of $47,446.56 for the claims of suppliers and subcontractors of Frick which have not been paid or even asserted. Since the statute of limitations has already run against the claims there is no reason to give Alpine a setoff for these claims. Alpine also objects

to the court's award of $119,546.17 for the extra work performed by Frick. Alpine has only conceded to $45,555.64 worth of extra work. The bankruptcy court and the district court examined the evidence and testimony regarding extras and we do not find the decision to award $119,546.17 to be clearly erroneous. The decision was proper whether based on a theory of quantum meruit or based on express contract principles since Alpine had waived the requirement of prior written authorization for extra work. The court found ample evidence of such a waiver. Finally, Frick was properly awarded prejudgment interest.

9. We will reverse the judgment of the district court on the issue of setoff for payments under the payment bond and affirm the judgment in all other respects.

TO THE CLERK:

Please file the foregoing opinion.

s/ James Hunter, III
James Hunter, III
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRICK CONSTRUCTION COMPANY, Debtor,	CIVIL ACTION NO. 84-2762
LAWRENCE N. RAVICK, Trustee,	BANKRUPTCY NO. 82-1028

v.

ALPINE CONSTRUCTION COMPANY, EUGENE M. LITMAN and FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

OPINION

COHILL, D.J.

Presently before us are the appeal of Alpine Construction Company ("Alpine"), the general contractor on the Swissvale Highrise condominium project ("project"), Eugene M. Litman ("Litman"), the owner and Fidelity and Deposit Company of Maryland ("Fidelity"), the surety, from a judgment entered in the United States Bankruptcy Court of the Western District of Pennsylvania and the cross appeal of Frick Construction Company, Debtor ("Frick") and Lawrence N. Ravick, Trustee ("Ravick").

The Bankruptcy Court had entered judgment in favor of Frick in the amount of $83,498.75 plus prejudgment interest from the date this action was commenced.

I. Background

On March 25, 1982, Frick filed a voluntary petition for bankruptcy under Chapter 7. 11 U.S.C. §§ 701-766 (1982). Ravick was appointed Trustee. As Trustee, he filed suit on behalf of Frick against Alpine, Litman and Fidelity for money allegedly owing under a construction contract. Alpine, Litman and Fidelity asserted a counterclaim for various credits allegedly due as a result of unfinished work and payments made by Alpine to certain suppliers and subcontracto of Frick pursuant to a payment bond.

The underlying construction contract, executed by the parties on December 23, 1980, designated Frick as the primary subcontractor on the project. In exchange for its efforts, Frick was to receive a total of $1,470,563.00

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in installments over the course of construction. The contract specified that Frick should make application for progress payments in writing and that Alpine would pay 90% of all labor and material costs within twenty days of receipt of each such application. Since the United States Department of Housing and Urban Development (HUD) was providing financial assistance on the project, all applications for progress payments required prior HUD approval.

Frick began construction in January of 1981. From April 15, 1981 through February 18, 1982, Frick submitted eleven applications for progress payments totalling $1,254,990.00. Over the course of the project, Frick also submitted twenty-six invoices for additional work ("extras") which it performed either at the instruction of the architect in charge of the project or according to changes made to the plans and specifications. These extras, totalling $119,546.17, were neither challenged

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nor paid for by Alpine. In addition, Alpine owed Frick approximately $245,000 in overdue progress payments. Largely as a result of these outstanding payments, Frick experienced severe cash flow problems forcing it to cease work on the project either March 16 or March 24, 1982.

Immediately prior to Frick's departure, an inspector for HUD, Dennis de Melker, estimated that the project was 98% complete. Based on testimony and evidence presented at trial, the bankruptcy court determined that the project was 94-96% complete when Frick left. Not all of the work remaining fell within Frick's contractual obligations. Also, Alpine made substantial revisions to the plans for the ninth floor, some of which may have required additional materials and labor.

II. Discussion

Our review of the bankruptcy court's judgment mirrors that which a United States Court of Appeals has over judgments rendered

by a United States District Court. Compare Fed. R. Civ. P. 52(a) and Bankruptcy Rule 8013. We can set aside the bankruptcy court's findings of fact only if they are clearly erroneous. In re Morrissey, 717 F.2d 100, 104 (3d Cir. 1983) (citing Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 103; Krasnov v. Dinan, 465 F.2d 1298, 1302-03 (3d Cir. 1972)). Our review of the court's interpretation and application of controlling legal precepts is plenary. Universal, 669 F.2d at 103.

A) Credit for extras

Frick argues that it is entitled to payment of $119,546.17 for extra work performed on the project which was not anticipated under the original plans and specifications. The contract provides that any claims for adjustment to the contract price for extra work to be performed must be submitted to Alpine in writing prior to commencement of the work. (Contract, at 11.9.1).

Frick maintains that Alpine waived this provision by course of conduct on a prior project ("Kroger project"). Furthermore, James S. Schwartz, general manager of the project, directed Frick to abide by instructions given by the architect with respect to plan changes. Finally, Frick contends that none of the changes were of an unusual or substantial nature and all were handled in a manner generally acceptable in the construction industry.

On the contrary, Alpine maintains that it did not waive any rights it had to accept, reject or negotiate additional costs. According to Alpine, even during prior dealings on the Kroger project, the parties saved all extra charges until after completion of the project, then met to settle the amount actually owed. Mr. Schwartz testified that some plan revisions could save money. Any saving realized should be set off from the claimed extras. Also, Alpine claims

certain items submitted by Frick as extras, actually fell within the scope of Frick's original contractual responsibility. Such items would have been deleted from Frick's claims list when the parties met to settle on the extras.

The bankruptcy court found that all changes inured to Alpine's benefit. Based on a theory of quantum meruit, the court found that Frick proved its claim for extras and was entitled to the full amount proven ($119,546.17). We find ample support both in fact and in law to support this decision.

A contract provision can be modified orally or waived even where it expressly states that modification must be in writing. See, e.g., Wagner v. Graziano Construction Co., 390 Pa. 136 A.2d 82 (1952). Construction contracts typically contain provisions requiring submission of written change orders prior to performances of

extra work. APCL & K, Inc. v. Richer Communications, Inc., 241 Pa. Super. 396, 361 A.2d 762, 765 (1976). When an owner requests extra work, fails to follow his own contractual procedure for authorizing it, allows the work to proceed under the watchful supervision of his agents and employees and accepts the benefits of the extra work, he cannot later refuse to pay for it. See, e.g., Universal Builders, Inc. v. Moon Motor Lodge, Inc., 430 Pa. 550, 244 A.2d 10, 16 (1968); Murray on Contracts § 712 (1974). Equitable considerations preclude such disdainful results.

Liability for the extras can be based on either of two related theories. First, Litman's inaction after Frick expressly requested that extras be signed as submitted may be construed as tacit approval of all extras submitted. See E.C. Ernst v. Koppers Co., Inc., 626 F.2d 324 (3d Cir. 1980), on remand 520 F.Supp. 830. According

to testimony of Mr. Frick, invoices were submitted to Litman with the request that they be approved as submitted. None of the invoices were signed but none were ever rejected either, despite evidence indicating that Mr. Litman or one of his agents knew that the extra work had commenced. While the Contract does provide for written submission of claims for extras, it does not require written approval of those claims. (Contract, at 11.9.1). Failure to challenge the invoices as submitted combined with acceptance of the work performed under those invoices should be construed as tacit approval.

Secondly, the extras provision may have been waived by the prior course of dealings on the Kroger project and the continued consistent conduct on this project. Exton Drive-In, Inc. v. Home Indemnity Co., 436 Pa. 480, 261 A.2d 319, cert. denied 400 U.S. 819, 91 S.Ct. 36, 27 L.Ed.2d (1969).

Mr. Frick testified that he had worked with Litman on a previous project where, as here, extras were directed by the architect, submitted prior to performance on invoices which were never signed and paid at the completion of the project. (Tr. 80). Furthermore, Mr. Frick testified that although he asked Litman to sign invoices as they were submitted and Litman agreed to do so, none of the invoices were ever signed. (Tr. 117). Instead, Litman permitted the extras to be performed with knowledge that they were being performed and never objected. By so doing, he waived his right to refuse payment. Exton, 261 A.2d at 326; Universal Builders, 244 A.2d at 15; Wagner, 136 A.2d at 84.

Alpine complains that, unlike the Kroger project, it was never given an opportunity to negotiate set-offs of any savings resulting from the extras. It claims that the court erred in awarding the total of all

the invoices submitted without crediting Alpine for any savings realized.

We note that Alpine never made any payments to Frick on any of the invoices submitted. Lack of capital, due primarily to the outstanding claims Frick had against Alpine, caused Frick to become insolvent and terminate its work on the project.

Alpine made no attempt to settle any of these claims in order to enable Frick to complete the project. Ample opportunity, either prior to this action or during the trial, was available for Alpine to establish the amounts, if any, of any set-offs.

The bankruptcy court found that Frick had proven its claim for extras in the amount of $119,596.17. Alpine had an opportunity to provide evidence challenging the alleged extras. Testimony given by Mr. Schwartz expressed Alpine's position that many of the extras claimed were items which,

under the Contract, Frick was already obliged to supply. (See, e.g. Alpine Ex. 7-A). Frick maintains that these items were not shown on the original plans and specifications which it relied on in preparing its bid, therefore, they constitute extras. Certain changes may have resulted in a savings to Frick rather than additional costs according to Mr. Schwartz. (See, e.g. Alpine Ex. 7-F; Tr. 275). However, he failed to provide concrete figures to substantiate any of these hypothetical credits. Furthermore, Mr. Schwartz conceded that he could not state affirmatively that Alpine would not have accepted any of these items as extras. After carefully reviewing the record, we are unwilling to declare the bankruptcy court's finding on extras clearly erroneous. See generally, Ernst, 626 F.2d at 332.

B) Credit for payments made under the payment bond

Under the Contract, Frick was required to pay for all materials, equipment and labor used in the fulfillment of its contractual duties. (Contract, at 11.2.6). When Frick stopped work on the project, it had accrued debts to suppliers and subcontractors totalling $232,437.45. Pursuant to the terms of a payment bond executed with the Contract, Alpine was liable for any claims submitted for materials and labor on the project in the event Frick failed to make payment. Consequently, Alpine contacted each supplier and subcontractor and settled Frick's accounts. Untimately, Alpine was able to satisfy the entire amount of Frick's outstanding debts for $176,447.18 because several of the creditors accepted reduced amounts as full payment.

Alpine argues that it is entitled to credit in the amount of the entire outstanding debt rather than the reduced

amount it actually paid since, had the Contract been fully performed, Frick would have paid the higher amount. Frick maintains that, under the theory of mitigation, only the reduced amount is subject to set-off. The bankruptcy court found hard evidence to support only the reduced amount and awarded Alpine a lower set-off.

We believe the bankruptcy court reached its conclusion based on an inapt interpretation of the law applied in Westinghouse Electric Supply Company v. Fidelity and Deposit Company of Maryland, 560 F.2d 1109, 1115 (3d Cir. 1977). Based on our reading of the Westinghouse case, we must reverse and allow set-off in the amount of the original debt.

In Westinghouse, as in the present case, the subcontractor was required to furnish all labor, material and equipment necessary to complete the subcontract. When the subcontractor's rating and financial condition

rendered it unable to purchase certain switches, the contractor made the purchase. The court determined the amount of set-off the contractor should receive by looking to what the subcontractor would have spent had it purchased the switches. "'Reasonable compensation' for (the contractor) should put it in the same financial position it would have enjoyed if (the subcontractor) had performed its original obligation to purchase the switches." Id.

Concededly, the facts in Westinghouse differ somewhat from the case at bar. Nevertheless, the same underlying principle governs. The Contract was based on the assumption that Frick would supply all materials and labor required to complete its portion of the project. This assumption obviously affected the contract price Alpine was willing to pay. If Alpine were permitted set-off only for the lesser amount, which

through Alpine's negotiation efforts Frick's creditors accepted as full payment, Frick would receive an inequitable windfall.

Mitigation of damages is an equitable doctrine allowing a reduction in damages where facts can be shown which tend to reduce the amount required for just compensation. 25 C.J.S. Damages § 96 (1966). Frick relies on Gaylord Builders v. Richmond Metal Manufacturing Corp., 186 Pa. Super. 101, 140 A.2d 358 (1958) for the proposition that Alpine had a duty to mitigate by settling Frick's debts for a reduced amount. Gaylord stands for the rule that an owner has a duty to mitigate damages by completing the contractor's unfinished work in a timely manner in order to avoid further damage. 140 A.2d at 359. The present situation is readily distinguishable. As noted earlier, Frick incurred the debts in question prior to withdrawing from the project and in accordance with the terms of the Contract.

These debts were not even tangentially related to Alpine's completion of the project after Frick withdrew. Had the Contract been fully performed, Frick would have incurred the entire unreduced expense. By Alpine paying these claims, Frick saved $232,437.45 and equity requires that amount to be credited to Alpine. 25 C.J.S. Damages § 97 (1966). Mitigation is inappropriate under these circumstances.

C) Credit for contingent claims and liabilities

Alpine seeks credit for all outstanding claims for which it would be liable under the payment bond should the creditors attempt to collect. The payment bond, which makes Alpine liable for Frick's project-related expenses, by its terms precludes collection actions brought "after the expiration of one (1) year following the date on which (Alpine) ceased work on (the) Contract." (Payment Bond, at ¶ 3b). Mr. Schwartz

testified that Alpine continued to make corrections upon request by occupants until the fall of 1983 (Tr. at 377), therefore, at the time of the bankruptcy court hearing, it remained liable under the payment bond. Alternately, Alpine argues that, should these unpaid creditors fail to take action to collect, Frick would realize a cost savings which should be passed along to Alpine.

Frick maintains that the project was complete in the summer of 1982. (Tr. at 315, 376). The trial took place in March of 1984. Hence, the limitation period contained in the payment bond had expired barring further collection actions against Alpine. The bankruptcy court agreed with Frick. Based on the record, we cannot find this conclusion to be clearly erroneous.

We find no case law supporting Alpine's cost savings theory. As distinguished from

the credit for payment of claims made under the payment bond, Frick would not receive a windfall due to efforts by Alpine to negotiate settlements on overdue debts. Had the contract been fully performed, but debts owed by Frick forgiven by some of its creditors, Alpine would not have been entitled to any reduction in the contract price.

D) Credit for cost to complete the project

Both Alpine and Frick challenge the court's assessment of the cost to complete the project. Alpine claims that it should have been awarded credit for the full amount claimed or $139,507.80 rather than the $90,529.91 awarded by the court. While offering no arguments to support this view, Alpine does indicate its understanding of how the bankruptcy court reached its decision. Alpine believes the court considered the testimony of Dennis de Melker, the HUD investigator, and other evidence indicating

the percentage completion, then arbitrarily determined that Frick was responsible for 5.7% of the 4-6% left unfinished.

Frick maintains that Alpine is entitled to no set-off whatsoever because Alpine failed to meet its burden of proof. According to Frick, Alpine had to prove each of the alleged costs and demonstrate that every item claimed as a credit fell within Frick's contractual responsibility.

A party seeking damages or set-off has the burden of proving his claim with reasonable certainty. Exton, 261 A.2d at 324, 325. However, justice dictates that compensation cannot be denied entirely because proof of the exact amount is not established. The proponent need only establish a legitimate basis from which the court can assess damages. Id. (citing Massachusetts Bonding & Ins. Co. v. Johnson & Harden, Inc., 343 Pa. 270, 280, 22 A.2d 709, 714 (1941)),

Borough of Yeadon v. Montgomery, 455 A.2d 785, 788 (Pa. Commw. 1983); Burly Construction Corp. v. Commonwealth Dept. of Justice, 284 A.2d 841, 844 (Pa. Commw. 1971).

Here, the court heard extensive testimony and accepted exhibits listing each cost incurred by Alpine in completing the project. Frick pointed out that several of the creditors listed provided items which were not among Frick's responsibilities under the Contract. Consistent with that testimony, the court deducted these items from the total costs submitted, as indicated by the list of contested expenses enumerated in the court's opinion, and arrived at a figure of $90,529.91. To insure that this figure was within the proper range, the court composed it to the original contract price. In so doing, the court discovered that, consonant with testimony and evidence on percentage completion, its figure represented 5.7% of the original cost.

Frick also asserts a cross-claim essentially reiterating its burden of proof argument. Specifically, Frick claims that the bankruptcy court misallocated the burden of proof and cites the following passage in support of that argument:

> A large expense for payroll of $39,603.00 was challenged by the plaintiff. Defendants offered proof that it was expended. The plaintiff did not meet their (sic) burden in challenging this item.

Opinion, at 11 (Emphasis added).

This passage is not inconsistent with the proper allocation of the burden of proof. As noted above, Alpine has the burden of proving its cost to complete the project. Exton, 261 A.2d at 324, 325. The bankruptcy court judge indicates that Alpine did offer sufficient proof that the challenged amount was expended in completing the Contract. Frick, in rebuttal, simply failed to convince the court that Alpine's evidence was incorrect.

Clearly, the bankruptcy court did not arbitrarily select a figure of 5.7% and determine the cost to complete on that basis, nor did the court improperly allocate any burden of proof. Finding no error in law or fact, we will affirm the bankruptcy court on this issue also.

E) Interest from the date of breach

Prejudgment interest in contract cases is awarded as a matter of right under Pennsylvania law when the amount of liability is liquidated. American Enka Co. v. Wicaco Machine Corp., 686 F.2d 1050, 1056 (3d Cir. 1982)(citing cases); Ernst, 626 F.2d at 332, 333. Interest is calculated from the time the money becomes due or payable under the terms of the contract. The fact that liability is contested, as in the case of the extras here, does not render damages unliquidated. Ernst, 626 F.2d at 332, 333 (citing Oxford Manufacturing Co. v. Cliff House Building Corp., 224 Pa. Super. 387, 307 A.2d 343, 345 (1973)).

The court properly awarded Frick prejudgment interest. However, that interest should be calculated from the date of breach rather than the date the suit was commenced. Consequently, we will amend the original order to include interest beginning in March of 1982.

Conclusion

We will reverse the judgment of the bankruptcy court on the issue of set-off for payments made under the payment bond, amend the judgment to include prejudgment interest from the date of breach rather than the date the complaint was filed, and affirm the judgment in all other respects.

s/Maurice B. Cohill, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRITCT OF PENNSYLVANIA

FRICK CONSTRUCTION COMPANY, Debtor,	CIVIL ACTION NO. 84-2762
LAWRENCE N. RAVICK, Trustee,	BANKRUPTCY NO. 82-1028

v.

ALPINE CONSTRUCTION COMPANY, EUGENE M. LITMAN and FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

ORDER

AND NOW, to-wit, this 10th day of May, 1985, it appearing that Bankruptcy Rule 8009(a) is adapted from Fed. R. App. P. 31(a) which construes narrowly dismissals for failure to file briefs within the statutory time limitations, it is ORDERED, ADJUDGED and DECREED that the Motion to Quash Appeal filed by Frick Construction Company and Lawrence N. Ravick and the Motion to Quash Cross Appeals filed by Alpine Construction Company, Eugene M. Litman and Fidelity and Deposit Company of Maryland be and hereby are denied. Further, it is ORDERED,

ADJUDGED and DECREED that the judgment of the bankruptcy court be and hereby is reversed in part, affirmed in part and amended in part in accordance with the written opinion accompanying this order.

s/Maurice B. Cohill, Jr.
United States District Judge

cc: U.S. Bankruptcy Court
James R. Cooney, Esq.
Maurice A. Nernberg, Jr., Esq.
Saul Davis, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

FRICK CONSTRUCTION COMPANY, Debtor,	Bankruptcy No. 82-1028
LAWRENCE N. RAVICK, Trustee, Plaintiff,	Adversary No. 83-0224
vs.	
ALPINE CONSTRUCTION COMPANY, EUGENE M. LITMAN and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendants.	

MEMORANDUM OPINION

Frick Construction Company voluntarily filed a petition under Chapter 7 on March 25, 1982. On April 2, 1982 an Order was entered appointing a Trustee. On January 27, 1983, the Trustee through special counsel sued Alpine Construction Company ("Alpine") together with Eugene Litman as an individual together with Fidelity and Deposit Company of Maryland as surety ("Surety").

The Trustee alleges that Frick Construction Company had entered into a contract with Alpine calling for payment of $1,470,563 and that $1,225,758.55 has been paid leaving a balance to be paid of $244,804.45. Additionally, the Trustee alleges that Alpine Construction Company through its agents authorized the Debtor to perform additional extra work and that the cost of this extra work is $119,546.17. The Debtor believes it is entitled to $364,350.62. In Count II the Trustee specifically names Fidelity and Deposit Company of Maryland as surety and asks for judgment against all Defendants.

Defendants answered and counterclaimed. Defendants raised the issue of jurisdiction over the subject matter, alleging that the contract called for arbitration. A dispute arose as to whether the arbitration provision applied to the surety. After some negotiation,

the parties have consented to the entire matter being heard by this Court.

Defendants raise several substantive defenses. (1) Various items of labor and material in the contract valued at $17,896 were deleted and that the Trustee should give credit for that deletion. (2) Defendants specifically deny that $119,546.17 was performed as additional extra work and aver instead that only $45,555.64 of additional extra work was performed. Defendants counterclaim and aver that the Debtor left undone work creating a cost to Alpine of $138,500; further, that Defendant paid materialman and subcontractor claims under the payment bond which have a value of $228,393.76; further, that claims of $51,490.25 remain as potential claims against the Defendants, all of which were Debtor's responsibility under the contract. Defendants ask for judgment in the sum of $145,919.92, being the difference between the sum of the items in the counterclaim and the

reduced amount of the Plaintiff claims.

Various pretrial pleadings were filed. Proposed findings of fact and conclusions of law were filed by Plaintiff and Defendants. Trial commenced on March 28, 1984 and continued for several days thereafter. Both Plaintiff and Defendants filed post-trial briefs and additional proposed findings of fact and conclusions of law.

BACKGROUND

The project was developed by the Owner, Forest Condominium Associates, in conjunction with the U.S. Department of Housing and Urban Development ("HUD") pursuant to the U.S. Housing Act of 1947. Alpine and Eugene Litman executed a payment bond with the Surety. Architectural Development Associates, Inc. was the architect. Kissell Company provided the mortgage. Application for advances required HUD approval.

Mr. Robert W. Frick, former President of Frick Construction Company ("Frick"), testified that he had worked with Mr. Eugene Litman before on a Kroger Market project at the Great Valley Shopping Center. Mr. Frick testified that Mr. Litman had requested his participation in the building of a high-rise condominium in Swissvale. Mr. Frick believed he had expertise in this area and he solicited preliminary estimates and final estimates from various subcontractors in the development of this project. At a time near September of 1980, Mr. Litman decided that Alpine, not Frick, would be the general contractor and would enter into some of these contracts with the subcontractors directly. Mr. Litman also decided that the bond would be guaranteed by Alpine and Mr. Litman. Frick was to be a major subcontractor under Alpine as the general contractor.

Mr. Frick believed he signed a contract in December of 1980 and that the job started in March of 1981. A preliminary access road was needed and excavation needed to be started before his part in the contract was to begin. Interim payments were to be made on a monthly basis. Frick was to submit monthly requisitions based upon percent completion. The on-the-job instructions were received from Mary Arendas Guthrie, who Mr. Frick believed was the designated architect authorized to give him orders. Mr. Frick believed he stopped work on March 23, 1982.

Mrs. Dorothy Frick also testified. Both Mr. and Mrs. Frick testified that in early 1983 they began to experience severe cash flow problems. The explanation the Fricks offered was that monies owed to them from Alpine were not paid. Those monies consisted of approximately $245,000 of overdue progress payments under the contract and $119,000 of extras.

Several unusual events appear to have occurred during the construction. The ninth floor of this high-rise building was modified so as to provide for larger apartments. Mr. Frick testified that Mr. Litman was to own personally two of the combined and modified apartments on the ninth floor. Mr. Frick testified that HUD would not approve of these changes and therefore it became desirable to close the loan relationship with HUD.

In order to close the financial relationships with HUD, a final inspection was necessary. It was also necessary and desirable to complete this inspection in order to sell several of the condominiums. This inspection took place about March 5, 1984 and appears to have determined that 98% of the job was completed.

Mr. Dennis de Melker testified that about $151,000 of work remained to be done,

and that it was HUD's practice to escrow one and one-half times that amount so that any errors in inspection could be accounted for, to encourage completion and to provide for inflation. This work was not limited to the work to be performed by Frick.
Mr. de Melker testified that he was not aware of any retainage owed to Frick. He also admitted that perhaps less than 98% of the job was completed. However, it appears that because the loan guaranteed by HUD was to be entirely paid, they were less exacting than they would have been in other circumstances.

In any case, after the final inspection, owners of the various condominiums could close and occupancy of the building would be permitted. Additionally, the warranties would begin to run with this letter.
Mr. de Melker's testimony indicated that changes were to occur on the ninth floor and

that these changes would upgrade the facility and would also require additional expenditures of money.

Mr. Schwartz, who was the General Manager of Alpine Construction, testified on behalf of the Defendants. Mr. Schwartz was the business manager of this enterprise. Mr. Schwartz testified that, in his opinion, March 16 was the last day that Frick performed on the job and not March 23. Mr. Schwartz's testimony also conflicted with Mr. Frick's testimony concerning the architect, Mrs. Guthrie. Mr. Schwartz testified that Mrs. Guthrie was not authorized to make changes. Mr. Schwartz testified that only he and Mr. Litman could make changes and those had to be in writing. This testimony is in conflict with the testimony of Mr. Frick.

Mrs. Guthrie represented Architectural Development Associates, which was a partnership or corporation hired to do the architectural work on this project.

Mr. Schwartz testified that several letters were sent to Frick Construction to return to the job by certified mail and that these letters were not answered. Frick Construction Company filed its bankruptcy petition on March 25, 1982. These letters from Alpine to Frick are dated March 31 and April 7, 1982. Although the parties do not raise the issue, the Court would observe that in a Chapter 7 case pursuant to 11 U.S.C. § 365(d)(1), executory contracts are deemed rejected 60 days after the petition is filed, unless the parties for cause petition otherwise. The Court is not aware of any such petition. Thus, in this case the contract would have been deemed rejected on about May 24, 1982.

It is clear to the Court that at the time Frick Construction left the job, the job was 94 to 98% complete. It is also clear that a principal reason for Frick not staying on the job was the failure of Alpine Construction

Company to make the monthly payments required under the contract. The Court believes that some of the disputes in this case were created by the owner who chose to make changes. These changes were solely for the benefit of the owner.

It is clear that the project was not complete and that the owner was required to expend monies to complete that project. It is equally fair to charge to the contractor, Frick Construction Company, the necessary costs for completion of the contract by the owner.

The Court summarizes the contract dispute in the table which follows. The contract disputes are footnoted in paragraphs that follow along with the Court's explanation of its decision.

	Plaintiff	Defendant	Court's Finding
Contract price	$1,470,563.00	$1,470,563.00	+$1,470,563.00
Contract paid	1,225,758.55	1,225,758.00	- 1,227,758.55
Extra claims	119,546.17(a)	45,555.64(a)	+ 119,546.17(a)
Deleted work		17,896.00(b)	- 14,144.71(b)
Incomplete work		139,507.80(c)	- 90,259.91(c)
Settlements	176,447.18(d)	293,905.40(d)	- 176,447.18(d)
Potential claim		47,446.56(e)	
Due to Trustee			84,498.82

(a) Robert Frick testified that many additional and extra items of work were performed. Further, that invoices and supporting documentation was regularly sent to Alpine. Frick's testimony was that these extras were the result of changes in the plans or the result of insufficient plans which necessitated additional work.

Frick testified that Alpine's on-site representative, Mary Arendas Guthrie, directed that the work be performed.

Alpine defends by asserting that Article 11.9.1 requires Frick to submit to Alpine written copies of the claim for adjustment prior to commencing the change. Frick maintained that Alpine waived this provision by a course of conduct on this job and the previous Kroger job. Further, that Mr. Litman personally instructed Frick to follow the direction of the architect, Mary Arendas Guthrie. Frick testified that many of these extras had to be performed in order to allow other work to progress. None of these changes was so great or so unusual that Frick would have been justified in slowing the progress of the job in order to obtain written agreement as to the price. These types of changes were well within the accepted practice of contractors and owners. Frick further testified that in the

previous Kroger project, a practice developed whereby Frick accepted direction from the architect, Frick forwarded invoices, and at the end of a job a settling of accounts occurred.

Alpine attempted through James Schwartz to establish that changes which increased the contract price required formal written authorization by Eugene Litman or James Schwartz. Under all of these circumstances, this is not a creditable position. It would not have been reasonable for Frick to delay work to obtain written approval. Although these invoices were not paid, none of these extra invoices received by Alpine was challenged when received. Setoffs of the items deleted and discussion of other compensating savings were in order at this time. However, this adjustment process which is common in the construction industry does not go to the issue of whether the

change was authorized and a benefit conferred. It does go to the issue of the amount of the value conferred by the extra work or change completed. This trial has become the forum for a determination of the value of those changes, that is, both those changes which increased costs and those changes which reduced costs. This Court has made a decision on the principle of quantum meruit and finds that the Plaintiff proved its claim for extras of $119,546.17.

(b) Defendants proved their case, except for one item, $3,751.29. (See Plaintiff's Exhibit #14).

(c) Defendants' Exhibits H and H-1 were introduced to support this claim. The Trustee disputed this claim. There are some inconsistencies between the punchlist, Exhibit H-1, and Exhibit H, which is a list of creditors actually paid. Several items shown as paid on Exhibit H were to parties for which no showing was made that under the

contract responsibility for performance belonged to Frick. Those items are shown below and excluded:

1.	Able Home Center	$23,807.88
2.	Benchmark Carpet	2,261.03
3.	Distributors, Inc.	904.57
4.	Duquesne Light	5,697.57
5.	General Electric	11,203.94
6.	Hayim & Company	690.00
7.	Lincoln Interior	526.76
8.	George Metzgar	576.00
9.	Peoples Natural Gas	2,219.26
10.	Angelo Lane	364.80
11.	Rochez Bros.	138.08
12.	Mezza Masonry	865.00

A large expense for payroll of $39,603 was challenged by the Plaintiff. Defendants offered proof that it was expended. The Plaintiff did not meet their burden in challenging this item.

Robert W. Frick testified that the job was approximately 98% complete. Dennis de Melker of HUD explained that "in reality" it was only 94-96% complete. The claim of Alpine of the expense necessary for completion is $139,507.80 or 8.8% of the total. Plaintiff's Exhibit 6K dated February 18, 1982 for the period 1/15/82 to 2/15/82 reports a balance of $102,150 remaining to be done. The parties agree that Frick either ceased work on March 16, 1982 or March 23, 1982, which would have provided approximately an additional month's work.

The Court finds that completion required $90,529.91 of additional work. This amounts to 5.7% of the total, or the contract was 94.3% complete, which the Court finds as substantial completion of the contract. A finding of $90,529.91 is also consistent with the above estimates.

(d) Plaintiff relies on Westinghouse Electric Supply Company v. Fidelity and Deposit Company of Maryland, 560 F.2d 1109 (3rd Cir. 1977) for the proposition that Alpine may set off only actual payments made to subcontractors and suppliers. Plaintiff also relies on Gaylord Builders, Inc. v. Richmond Metal Mfg. Corp., 186 Pa. Super. 101, 140 A.2d 358 (1958) for the proposition that Alpine had a duty to mitigate the Debtor's damages in settling with Frick's subcontractor and supplier claimants. Alpine does not dispute Frick's argument that Alpine was required to negotiate the bast possible settlement of these claims. Alpine argues that having negotiated lower settlements it should not be required to pass on to Frick, or more important here, the Trustee, the benefits. Alpine argues that Frick was obligated to pay $232,437.45 to these suppliers and subcontractors. Frick is now relieved of

that duty. This argument sounds in subrogation. Alpine as principal for the Surety and/or as general contractor paid and relieved Frick of this duty and now raises their full claim against Frick or the Trustee. No cases are cited in bankruptcy or otherwise to support this view.

The concern the Court has with these legal theories is that although $232,437.45 was asserted claimed, such assertion is not proof that it was owed. The Court is only certain that $176,447.18 was paid. As in this lawsuit, claims are subject to dispute. In the absence of hard evidence that these debts were owed, final payment and acceptance of that payment by these claimants as satisfaction of the debt appears to the Court to be a sounder measure of the actual debt owed by Frick to the subcontractors and suppliers. If more were owed, the claimants could have pursued the Surety also.

The Westinghouse case, although admittedly on different facts, influences this Court to utilize the actual amounts paid as the proper measure of the debt owed by Frick to the subcontractors and suppliers and also as a proper measure of setoff as to the Trustee.

(e) Alpine claims a credit for outstanding claims which may be asserted by other suppliers and subcontractors of Frick amounting to $47,446.56. These claims have not been paid. Alpine did not establish that these claims are currently enforceable against Alpine or the Surety. It appears that the statute of limitation has been tolled. Accordingly, this claim by Alpine is denied. The legal rationale of the Court's decision is (d) above also applies to this claim.

The foregoing constitutes this Court's findings of fact and conclusions of law. Therefore, judgment for the Plaintiff in the amount of $83,498.75 will be granted,

along with interest at 6% from January 27, 1983, the date of the filing of this adversary proceeding.

An appropriate Order will issue.

Dated this 20th day of August, 1984 at Pittsburgh, Pennsylvania.

Joseph L. Cosetti
U.S. Magistrate for
Bankruptcy

cc: James R. Cooney, Esq.
301 Smithfield Street
Pittsburgh, PA 15222

Saul Davis, Esq.
718 Fifth Avenue
Pittsburgh, PA 15219

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

FRICK CONSTRUCTION COMPANY, Debtor,	Bankruptcy No. 82-1028
LAWRENCE N. RAVICK, Trustee, Plaintiff,	Adversary No. 83-0224
vs.	
ALPINE CONSTRUCTION COMPANY, EUGENE M. LITMAN and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendants.	

ORDER OF COURT

AND NOW, this 20th day of August, 1984, upon the basis of the Memorandum Opinion of even date herewith, IT IS ORDERED that judgment is hereby granted in favor of the Plaintiff, Lawrence N. Ravick, Trustee, against Defendants, Alpine Construction Company, Eugene M. Litman and Fidelity and Deposit of Maryland, in the amount of $83,498.75 with interest at 6% from January 27, 1983.

At Pittsburgh Pennsylvania.

Joseph L. Cosetti
U.S. Magistrate for
Bankruptcy

cc: James R. Cooney, Esq.
Saul Davis, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 85-3317 & 85-3354

FRICK CONSTRUCTION COMPANY, Debtor

LAWRENCE N. RAVICK, Trustee

v.

ALPINE CONSTRUCTION COMPANY, EUGENE M. LITMAN and FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Appellants in No. 85-3354

Frick Construction Company by its Trustee, Lawrence N. Ravick, Appellant in No. 85-3317

SUR PETITION FOR REHEARING

Present: ADAMS and HUNTER, Circuit Judges, and GILES,* District Judge

The petition for panel rehearing filed by Alpine Construction Company, Eugene M. Litman and Fidelity and Deposit Company of Maryland

in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

_____

James Hunter, III
Circuit Judge

Dated: April 1, 1986

*Honorable James T. Giles, United States District of Pennsylvania, sitting by designation

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3317 & 85-3354

FRICK CONSTRUCTION COMPANY, etc.

vs.

ALPINE CONSTRUCTION COMPANY, etc.

Frick Construction Co., Appellant in No.85-3317

Alpine Construction Co., Appellant in No. 85-3354

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above casue be, and it is hereby stayed until May 8, 1986.

James Hunter, III
Circuit Judge

Dated: April 16, 1986